



## Santa Clara Law Review

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Volume 49 | Number 4

Article 1

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1-1-2009

# Santa Clara Law Review

Jeffrey Rosen

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### Recommended Citation

Jeffrey Rosen, Symposium, *Santa Clara Law Review*, 49 SANTA CLARA L. REV. 929 (2009).

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## KEYNOTE ADDRESS

### SANTA CLARA LAW REVIEW SYMPOSIUM: BIG BUSINESS AND THE ROBERTS COURT

Jeffrey Rosen\*

It's a pleasure to be here, and thank you so much for inviting me to talk about the Roberts Court and Big Business. You were kind enough to invite me, as Bradley Joondeph mentioned, because of an article I wrote about the Supreme Court and business interests called *Supreme Court Inc.*,<sup>1</sup> which was a follow-up to an earlier article about the Supreme Court and libertarian conservatives called *The Unregulated Offensive*.<sup>2</sup> Both pieces provoked energetic responses—some of them encouraging, some of them skeptical. So I'm delighted to come to this distinguished law school to learn that at least one of the arguments was right after all. Many of the statistics discussed in the symposium demonstrate that the Roberts Court, broadly speaking, does have a generally pro-business orientation, and has largely disappointed at the same time the ambition of some libertarian and originalist conservatives who had hoped that it would take its revolution even further, and strike down regulations at the core of the post-New Deal regulatory state.

In thinking further about the relationship between the two strands of the conservative legal movement over the past thirty years, I've come to realize that the pro-business and libertarian conservatives are in more significant tension with each other than I had initially understood. Over the past thirty years, there has been a significant fissure between libertarian conservatives, represented by think-tanks like the

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\* Professor of Law, George Washington University Law School.

1. Jeffrey Rosen, *Supreme Court, Inc.*, N.Y. TIMES, Mar. 16, 2008, § MM (Magazine), at 38.

2. Jeffrey Rosen, *The Unregulated Offensive*, N.Y. TIMES, Apr. 17 2005, § 6 (Magazine), at 42.

Cato Institute and the Institute for Justice, and pro-business conservatives, represented by the Chamber of Commerce's National Chamber Litigation Center. Despite their shared commitment to free markets and deregulation, the libertarians and the pro-business conservatives have very different goals and strategies. Libertarian conservatives want to limit federal power to protect states' rights; pro-business conservatives are willing to extend federal doctrines like preemption to protect the national uniformity that business interests prefer.

Libertarian conservatives unapologetically embrace Constitutional judicial activism and arguments about the original understanding of the constitutional text; pro-business conservatives are more interested in using statutory arguments to check what they call "regulation by litigation."<sup>3</sup> Libertarians think pro-business conservatives are more interested in promoting corporate business interests than in a principled commitment to limited government; pro-business conservatives respond that being conservative doesn't always mean being pro-business.

The ideological distance between libertarian and pro-business conservatives can be measured by their very different responses to the recent economic bailout, including the Troubled Asset Relief Program ("TARP"),<sup>4</sup> and the stimulus package.<sup>5</sup> Unlike the libertarians, the Chamber of Commerce isn't ideologically opposed to the economic bailout. In January, the Chamber wrote to Congress that it "strongly supported" the broad outlines of TARP and the stimulus bill, although it has expressed concern about some of the lobbying restrictions on TARP recipients.<sup>6</sup> TARP relies on centralized regulatory bodies to promote economic well-being and corporate responsibility, rather than relying on regulation by

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3. See generally ANDREW MORRISS ET AL., REGULATION BY LITIGATION (2008); REGULATION THROUGH LITIGATION (W. Kip Viscusi ed., 2002).

4. See 12 U.S.C.S. §§ 5211-41 (LexisNexis 2009). The TARP was enacted as part of the Emergency Economic Stabilization Act of 2008, in response to the sub-prime mortgage crisis and ensuing economic recession.

5. See American Recovery and Reinvestment Act of 2009, Pub. L. No. 111-5, 123 Stat. 115 (2009).

6. Letter from R. Bruce Josten, Executive Vice President of Gov't Affairs, Chamber of Commerce of the United States of America, to the Members of the United States Congress (Jan. 6, 2008), available at [http://www.uschamber.com/assets/sab/090106\\_EconomicStimulus\\_Congress.pdf](http://www.uschamber.com/assets/sab/090106_EconomicStimulus_Congress.pdf).

litigation<sup>7</sup>—both features that arguably advance the Chamber's mission to promote "the unified interests of American business."

The libertarians, by contrast, have already pledged to challenge the bailout in court. In January, Freedom Works, an organization chaired by former Republican House majority leader Dick Armey and founded in 1984 to promote "lower government, less taxes, and more freedom,"<sup>8</sup> declared that Congress has unconstitutionally delegated lawmaking power to the president.<sup>9</sup> Freedom Works plans to file a lawsuit alleging that the TARP violates the "non-delegation doctrine," recognized in cases before the New Deal, which holds that Congress can't delegate legislative authority to the executive branch without "intelligible principle[s]" to guide its discretion.<sup>10</sup>

The Freedom Works lawsuit on the horizon is hardly the only potential libertarian challenge to the TARP, the stimulus bill, and other government bailouts. According to Laurence Tribe of Harvard Law School, there are a number of possible avenues for constitutional challenges to the bailouts, even beyond the excessive delegation challenges that may multiply as the original plan to buy troubled assets has morphed into a plan to treat auto companies as financial institutions.<sup>11</sup> Tribe predicts that libertarians may claim that TARP violates the constitutional requirement that taxing measures must originate in the House rather than the Senate; question some of the appointment procedures for the Recovery Accountability and Transparency Board (the "RAT Board"), which is responsible for preventing fraud and abuse; argue that states can't be forced to change their unemployment laws as a condition of accepting bailout funds; and challenge home foreclosure provisions of the stimulus bill as unconstitutional

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7. See 12 U.S.C.S. § 5214 (LexisNexis 2009) (establishing a Financial Stability Oversight Board within the Treasury Dept. to oversee the administration of the TARP).

8. John Schwartz, *Some Ask if Bailout Is Unconstitutional*, N.Y. TIMES, Jan. 15, 2009, at A16.

9. See, e.g., Matt Kibbe, *The Unconstitutional Bailout*, POLITICO, Feb. 2, 2009, <http://www.politico.com/news/stories/0209/18265.html>. Matt Kibbe is President of the Freedom Works Foundation.

10. Schwartz, *supra* note 8.

11. Jeffrey Rosen, *TARP Heels*, NEW REPUBLIC, Mar. 18, 2009, <http://www.nnr.com/politics/story.html?id=e4d5f35c-98c4-4427-9db6-b55eb9963b9>.

seizure of property without just compensation.<sup>12</sup>

The libertarian lawsuits seem to vindicate the fears of liberals who have charged that libertarians are determined to resurrect the so-called "Constitution in Exile,"<sup>13</sup> invoking constitutional limits on federal power to regulate the economy that have been dormant since the New Deal. But the likely failure of the lawsuits shows how dramatically the pro-business conservatives have succeeded and the libertarian conservatives have failed in their efforts to use arguments about original understanding to transform the American legal culture. "The legal precedent on striking down excessive delegations is not exactly favorable," I was told by Robert Levy, chairman of the CATO Institute. "I can't identify even a minimal possibility that a commerce clause challenge would succeed." Although the libertarians had some success in the 1990s, when states' rights conservatives like Sandra Day O'Connor and William Rehnquist waved the banner of federalism, they have only a single possible vote on the Supreme Court today: Justice Clarence Thomas. (The other originalist on the Court, Antonin Scalia, is not a consistent supporter of states' rights). In fact, the libertarian rout has been apparent since the *Gonzales v. Raich* case in 2005, when Justice Scalia joined a six-to-three Supreme Court decision upholding Congress's power, under the commerce clause, to ban the use of pot, even when states have approved its use for medicinal purposes.<sup>14</sup> (Three states' rights conservatives—Thomas, O'Connor, and Rehnquist dissented; only Thomas remains on the Court).

If the libertarian conservatives expect their lawsuits to fail, the pro-business conservatives have been crowed with remarkable success. All nine Justices on the Roberts Court share, to varying degrees, a suspicion of "regulation by litigation." About forty percent of the Court's docket is now made up of business cases, up from thirty percent in recent years, and seventy-nine percent of them are decided by margins of seven-to-two or better.<sup>15</sup> But it may be useful to

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12. *Id.*

13. See Rosen, *supra* note 2.

14. See *Gonzales v. Raich*, 545 U.S. 1, 33–43 (2005) (Scalia, J., concurring).

15. See Michael Orey, *The Supreme Court: Open for Business*, BUS. WK., July 9, 2007, at 30; see generally Robin S. Conrad, *The Roberts Court and the Myth of a Pro-Business Bias*, 49 SANTA CLARA L. REV. 997 (2009).

distinguish among, or between, the 2006 and 2007 terms, because it helps show some of the fissures in the pro-business record.

The 2006 term was exceptionally good for American business. The Chamber's litigation center filed briefs in fifteen cases and won thirteen of them, the highest percentage of victories in the center's thirty year history.<sup>16</sup> By contrast last term, the 2007 term was more mixed for the Chamber, with seven victories, seven defeats, and one partial victory.

If you break down the cases last term, however, of those seven defeats, five of them were employment law cases. And in employment, environmental, and labor case, liberals and conservatives are more likely to divide along predictable ideological lines, because they have firm commitments about equality and the appropriate role of regulation in the workplace.

In a public interview last year, I asked Justice Breyer why the Court was so pro-business. Although he resisted the suggestion, he did acknowledge that there might be a difference between constitutional cases, where Justices have strong preconceptions and philosophical commitments, and more technical, statutory cases, where they are more open-minded and amenable to argument. If that observation is correct, as I think it is, it may explain why in some cases of interest to the business community—environmental, employment, and labor law cases—there are other strong commitments—the commitment to equality in the employment cases or to the environment or to labor—that may trump the free market orientation that is shared by liberal and conservative Justices in other business cases.

If you leave out the environment, labor, and employment cases, and look at the remaining forty-six business cases before the Roberts Court in which the Chamber participated, most of them go the Chamber's way, in areas ranging from punitive damages, preemption, false claims acts, securities suits, private, and antitrust cases. Richard Lazarus' statistics help further to illustrate how successful the

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16. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court*, 96 GEO. L.J. 1487, 1555 (2008).

Chamber has been.<sup>17</sup> The Court currently accepts less than two percent of the petitions it receives every year in the absence of amicus support;<sup>18</sup> the Chamber of Commerce's petitions between 2004–07 were granted at the rate of twenty-six percent. Lazarus found that the Court reverses the lower court in sixty-five percent of the cases it agrees to hear when the petitioner is represented by elite Supreme Court practitioners;<sup>19</sup> often working with the Chamber, the success rate is seventy-five percent. For that reason, I think the broad claim that this is a pro-business Court is hard to dispute.

Some see the consensus in most of these business cases as evidence that the Court can't be ideologically biased in business cases. Professor Adler, in a response to Professor Chemerinsky,<sup>20</sup> said, accurately I think, this is no pre-New Deal Court.<sup>21</sup> "Nor is the Court's apparent solicitude for business concerns particularly rigid or ideological. To the contrary, the results in most business law cases are lopsided, and rarely the result of an ideological division on the Court."<sup>22</sup> But this seems precisely the point. Consensus doesn't prove that the Court isn't biased. It just shows that the traditional liberal-conservative splits in culture war issues don't carry on into business issues. There is an ideological bias on the Court; it's just that all the Justices share the basic ideology when it comes to markets and regulation.

Why have the pro-business conservatives been so successful, while the libertarians have petered out? The most obvious reason: there is no economic populist on the current Supreme Court—no justice in the tradition of William O. Douglas, who once boasted that he was eager to use the law to bend the law against the corporations and in favor of the environment.<sup>23</sup> And it's not a coincidence that there's no economic populist on the Court. That reflects changes in the

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17. See generally *id.*

18. *Id.* at 1528–29.

19. *Id.* at 1540.

20. See Erwin Chemerinsky, *The Roberts Court at Age Three*, 54 WAYNE L. REV. 947 (2008) (observing a pro-business orientation on the Roberts Court).

21. Jonathan H. Adler, *Getting the Roberts Court Right: A Response to Chemerinsky*, 54 WAYNE L. REV. 983 (2008).

22. *Id.*

23. BRUCE ALLEN MURPHY, *WILD BILL: THE LEGEND AND LIFE OF WILLIAM O. DOUGLAS* 455 (2003).

legal culture, as well as the energetic efforts of the Chamber of Commerce and other groups to lobby for the appointment of free market liberals and conservatives rather than economic populists or states rights conservatives.

In each of these categories, of course, you find liberal and conservative examples. There are liberal and more conservative economic populists, for example, such as William O. Douglas and Hugo Black. Similarly, states rights libertarians appear on both sides of the political spectrum. Brandeis and O'Connor both opposed federal regulation and thought most economic regulation should be anchored at the state level. And you can have liberal and conservative free-market nationalists, ranging from Breyer to Roberts.

The Chamber of Commerce was bipartisan in its lobbying efforts, and said that it would work with democrats as well as republicans in arguing for the appointment of pro-business nationalists at every turn. And the Chamber was successful in this effort, encouraging the appointment of Justices such as Breyer, Roberts, and Alito, rather than states rights enthusiasts like Thomas. Both Roberts and Alito have fulfilled the Chamber's hopes. They're not committed originalists; they don't have a states rights ideology, and are both more interested in supporting national power than limiting it. We've heard Mitchell Pickerill's interesting statistics showing that Roberts and Alito vote for the federal government over the states more frequently than O'Connor and Rehnquist.<sup>24</sup> We heard David Franklin's statistics about how the Justices most likely to vote against preemption were Stevens followed by Thomas.<sup>25</sup> Bradley Joondeph has noted that the "federalism five" are fifteen percent more likely to vote for federal preemption than the liberal dissenters in federalism cases.<sup>26</sup> And finally, Vikram Amar has reminded us that Roberts and Alito just don't buy into Scalia and

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24. See generally Mitchell Pickerill, *Something Old, Something New, Something Borrowed, Something Blue*, 49 SANTA CLARA L. REV. 1063 (2009).

25. See generally David L. Franklin, *What Kind of Business-Friendly Court? Explaining the Chamber of Commerce's Success at the Roberts Court*, 49 SANTA CLARA L. REV. 1019 (2009).

26. See Bradley W. Joondeph, *Federalism, the Rehnquist Court, and the Modern Republican Party*, 87 OR. L. REV. 117, 143 (2008) ("Rehnquist, O'Connor, Scalia, Kennedy, and Thomas were much more ambivalent about state autonomy . . . as a group they were substantially less likely than their four remaining colleagues to vote for the result that favored state autonomy.").



Thomas' opposition to punitive damages.<sup>27</sup>

The differences between Roberts and Alito, the nationalists, and Thomas and (to a much less consistent degree) Scalia, the originalist federalists, are obvious. Consider cases involving the dormant commerce clause. Alito has shown that he very much wants to use it as a tool to strike down state legislation. Scalia and Thomas, the sometimes states' righters, think the doctrine is bunk. Roberts seems ambivalent, and Kennedy, the nationalist, is more likely to side with Alito. Roberts and Alito are movement conservatives, like Scalia and Thomas, but they come from a different wing of the movement than their originalist colleagues.

It's worth noting that the libertarians and the pro-business conservative wings were originally more closely matched than they are today. Like most commentators, Steven M. Teles, in the *Rise of the Conservative Legal Movement*,<sup>28</sup> traces the movement back to Lewis Powell's memorandum in 1971, when he expressed concern about Ralph Nader's success in mobilizing liberal public interest groups on behalf of a broad attack, as he called it, against the American economic system.<sup>29</sup> To counteract the effect of Nader and his colleagues, Powell urged the Chamber of Commerce to begin a multi-front lobbying campaign on behalf of business interests, noting that "the judiciary may be the most important instrument for social, economic and political change."<sup>30</sup> Six years later, the National Chamber Litigation Center filed briefs on behalf of business interests in federal and state court.

Teles argues that the libertarians were more successful than their pro-business colleagues, because conservative public interest organizations were initially funded

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27. Vikram David Amar, *Business and Constitutional Originalism in the Roberts Court*, 49 SANTA CLARA L. REV. 979 (2009).

28. STEVEN M. TELES, *THE RISE OF THE CONSERVATIVE LEGAL MOVEMENT: THE BATTLE FOR CONTROL OF THE LAW* (2008).

29. *Id.* at 61–62; Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce (Aug. 23, 1971), available at [http://www.pbs.org/wnet/supremecourt/personality/sources\\_document13.html](http://www.pbs.org/wnet/supremecourt/personality/sources_document13.html).

30. Memorandum from Lewis F. Powell, Jr. to Eugene B. Sydnor Jr., Chairman, Educ. Comm., U.S. Chamber of Commerce, *supra* note 29.

geographically, mostly by corporate interests.<sup>31</sup> At times, these corporate interests clashed with the broad deregulatory agenda of the true-believing libertarians.<sup>32</sup> So the libertarians regrouped, and during the 1980s, got more of their funding from wealthy individual libertarian entrepreneurs rather than from local Chambers of Commerce.<sup>33</sup> As a result, they were able to start the Center for Individual Rights, the Institute for Justice, and other libertarian advocacy groups.<sup>34</sup> But Teles, I think, underestimates the ways in which, unlike the National Chamber Litigation Center, the libertarian groups have failed in their broad ambition, which is to strike at the heart of the post-New Deal regulatory state. They've had some success in cases striking down affirmative action<sup>35</sup> and restrictions on interstate wine importation.<sup>36</sup> They've successfully championed small entrepreneurs and small business, like limo drivers in Las Vegas,<sup>37</sup> African-American hair braiders in San Diego,<sup>38</sup> and casket sellers in Tennessee.<sup>39</sup>

But as Scalia's defection to the nationalist side in *Gonzalez v. Raich*<sup>40</sup> shows, the broader project of resurrecting a pre-New Deal understanding of limits on federal power has failed. And Scalia's defection, as well as the failure of the broader libertarian project, was foreshadowed as early as 1984 by a debate at the Cato Institute between Scalia and

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31. TELES, *supra* note 28, at 58; *see generally id.* 62–64.

32. *Id.* at 65–66.

33. *Id.* at 227–28.

34. *Id.* at 222, 238–40.

35. *See, e.g.,* Gratz v. Bollinger, 539 U.S. 244 (2003) (striking down the University of Michigan's undergraduate admissions system, which automatically gave a twenty “point” advantage to minority applicants). *But see* Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the University of Michigan's law school admissions process, which considered the race of applicants, but only as a “plus” factor narrowly tailored to improving student body diversity).

36. Granholm v. Heald, 544 U.S. 460 (2005).

37. *See* Institute for Justice, *IJ Wins Court Victory Vindicating Economic Liberty for Las Vegas Limo Operators*, [http://www.ij.org/index.php?option=com\\_content&task=view&id=775&Itemid=165](http://www.ij.org/index.php?option=com_content&task=view&id=775&Itemid=165) (last visited Apr. 4, 2009).

38. Cornwell v. Cal. Bd. of Barbering and Cosmetology, 962 F. Supp. 1260 (S.D. Cal. 1997).

39. Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002).

40. *Gonzales v. Raich*, 545 U.S. 1, 35 (2005) (“Where necessary to make a regulation of interstate commerce effective, Congress may regulate even those intrastate activities that do not themselves substantially affect interstate commerce.”).

Richard Epstein, the hero of the libertarians. At the debate, Scalia, speaking first, defended the view that judges should restrain themselves from overturning legislation in the name of rights or liberties not clearly and expressly enumerated in the Constitution. As a traditional federalist, he had his own qualms about the constitutionality of unlimited federal power, but he didn't like *Roe v. Wade*<sup>41</sup> or *Lochner v. New York*,<sup>42</sup> he didn't want to make up constitutional rights, and he thought the Warren Court had been insufficiently deferential to legislatures. This made Epstein's head explode. He threw away his prepared remarks, spontaneously attacked Scalia, and said that many statutes called out for a quick and easy kill. Judges had to be more aggressive in protecting economic liberties; and, he said unapologetically, some movement in the direction of judicial activism is clearly indicated.

It's striking to note how little success that call has had. Epstein's libertarian vision was embraced most specifically in Clarence Thomas' concurrence in the *United States v. Lopez*<sup>43</sup> case (not only specifically but literally—some noted that some passages seemed to be lifted directly from Epstein's famous article on the proper limits of the commerce clause).<sup>44</sup> But the majority of the Court as a whole has rejected the Epsteinian and Thomas vision. As Arlen Specter said in John Roberts' confirmation hearing, the Court itself recanted the constitutional approach proclaimed in *Lopez* in the *Gonzales v. Raich* case, which held that federal drug laws preempted state laws legalizing medical marijuana.<sup>45</sup> When Justice Stevens said that Congress' commerce clause authority includes the power to prohibit the local cultivation and use of marijuana in compliance with California laws, he reaffirmed

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41. *Roe v. Wade*, 410 U.S. 113 (1973) (finding a fundamental right in a woman's choice to obtain an abortion).

42. *Lochner v. New York*, 198 U.S. 45 (1905), *overruled by* *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (finding a fundamental right in the "freedom to contract" and ushering the era of economic substantive due process, which severely curtailed the government's power to regulate economic activity until repudiated by *West Coast Hotel Co. v. Parrish*).

43. *United States v. Lopez*, 514 U.S. 549, 584 (1995) (Thomas, J., concurring).

44. Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387 (1987).

45. *Gonzales v. Raich*, 545 U.S. 1 (2005).

*Wickard v. Filburn*,<sup>46</sup> the boogey-man of Thomas and Epstein, and drove a stake through the heart of the most enthusiastic hopes of the libertarian-originalists. Another mortal blow to the libertarians was the *Kelo v. City of New London* case, which suggested there's no majority on the current Court for using doctrines like the takings clause to limit federal or state regulations in an aggressive way.<sup>47</sup>

Roberts and Alito seem comfortable with the post New Deal settlement, and don't seem interested in resurrecting the non-delegation doctrine, or limits on the commerce clause, to pursue a deregulatory agenda. As a result, most of the pro-business activity of the Roberts Court has been in the statutory arena. And that's relevant not only, as Breyer suggests, because it's easier to get some kind of consensus in cases that don't engage the passions of the Justices as much, but also because there's less of an instinctive suspicion to creative, deregulatory statutory arguments among traditional conservatives like Scalia, who retain vestigial suspicion of substantive due process.

Might anything change the general pro-business orientation of the Roberts Court? I'll be interested to watch the role of the solicitor general. One theory is that the Roberts Court isn't really pro-business or pro-employee at all, but that most of its decisions for and against business can be reconciled by a single unifying factor: the position of the solicitor general. Justice Breyer believes in deference to executive agencies, for example, and he may have been moved by the Bush administration's briefs on behalf of federal preemption. Of course, it's hardly clear that General Elena Kagan will take a dramatically different position in business cases than Generals Ted Olson, Paul Clement, and Gregory Garre. She is hardly an economic populist, and has defended the powers of the unitary executive before the conservatives dramatically expanded that theory.<sup>48</sup>

What about future Obama nominees to the Supreme

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46. *Wickard v. Filburn*, 317 U.S. 111 (1942) (upholding the federal government's commerce power to regulate the production of wheat grown entirely for private consumption and never entering interstate commerce).

47. *Kelo v. City of New London*, 545 U.S. 469 (2005) (upholding the use of eminent domain to transfer land from one private owner to another for purposes of economic development).

48. Elena Kagan, *Presidential Administration*, 114 HARV. L. REV. 2245 (2001).

Court? Can we imagine that the president will appoint the first economic populist since William O. Douglas? Some of his rhetoric should be encouraging to people with a populist inclination. He said that he wants a Justice who will favor the powerless rather than the powerful,<sup>49</sup> and that his model is Earl Warren,<sup>50</sup> who understood the practical effects of Supreme Court decisions on ordinary Americans. He believes that the current Court favors the powerful at the expense of the powerless.<sup>51</sup> Nevertheless, his most frequently vetted nominees include candidates such as Kagan and Cass Sunstein who, despite their many virtues, cannot be described as economic populists. For this reason, although Obama may be drawn to the economic populist tradition, it's hardly obvious that he will appoint a justice from that tradition. The legal culture has changed too dramatically, especially in the academy, and there are few William O. Douglases waiting in the wings.

That leads to my final question. Will the changed political zeitgeist in light of the economic collapse make economic populism more fashionable, and cause liberals and conservatives on the Court to question their pro-free market orientation? Skepticism of regulation by litigation may be less fashionable now that even Alan Greenspan has said that he is shocked by the excesses of the market.<sup>52</sup> A recent study showed that securities lawsuits are up seventy percent from two years ago.<sup>53</sup> Will the Supreme Court, which often responds to winds of change, include less rhetoric in its opinions about the high cost of litigation?

Only Justice Kennedy knows. But, as the Chamber of Commerce shows, it's possible enthusiastically to support regulation by legislation—such as the TARP and the stimulus bill—and still oppose regulation by litigation. And even in the most challenging economic circumstances, it's hard to

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49. David G. Savage, *Two Visions of the Supreme Court*, L.A. TIMES, May 18, 2008, at A8.

50. *Id.*

51. *Id.*

52. Edmund L. Andrews, *Greenspan Concedes Flaws in Deregulatory Approach*, N.Y. TIMES, Oct. 24, 2008, at B1.

53. ELLEN M. RYAN & LAURA E. SIMMONS, CORNERSTONE RESEARCH, SECURITIES CLASS ACTION SETTLEMENTS: 2008 REVIEW AND ANALYSIS 4 (2009), available at [http://securities.stanford.edu/Settlements/REVIEW\\_1995-2008/Settlements\\_Through\\_12\\_2008.pdf](http://securities.stanford.edu/Settlements/REVIEW_1995-2008/Settlements_Through_12_2008.pdf).

imagine Justice Kennedy transforming himself into a fire-breathing William O. Douglas. For this reason, the organizers of this symposium have performed a great service by calling our attention to the pro-business (but non-libertarian) orientation of the Robert Court, an orientation that is likely to continue for decades to come.

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